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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 189

DAVID V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

and

BRIEF IN SUPPORT OF PETITION.

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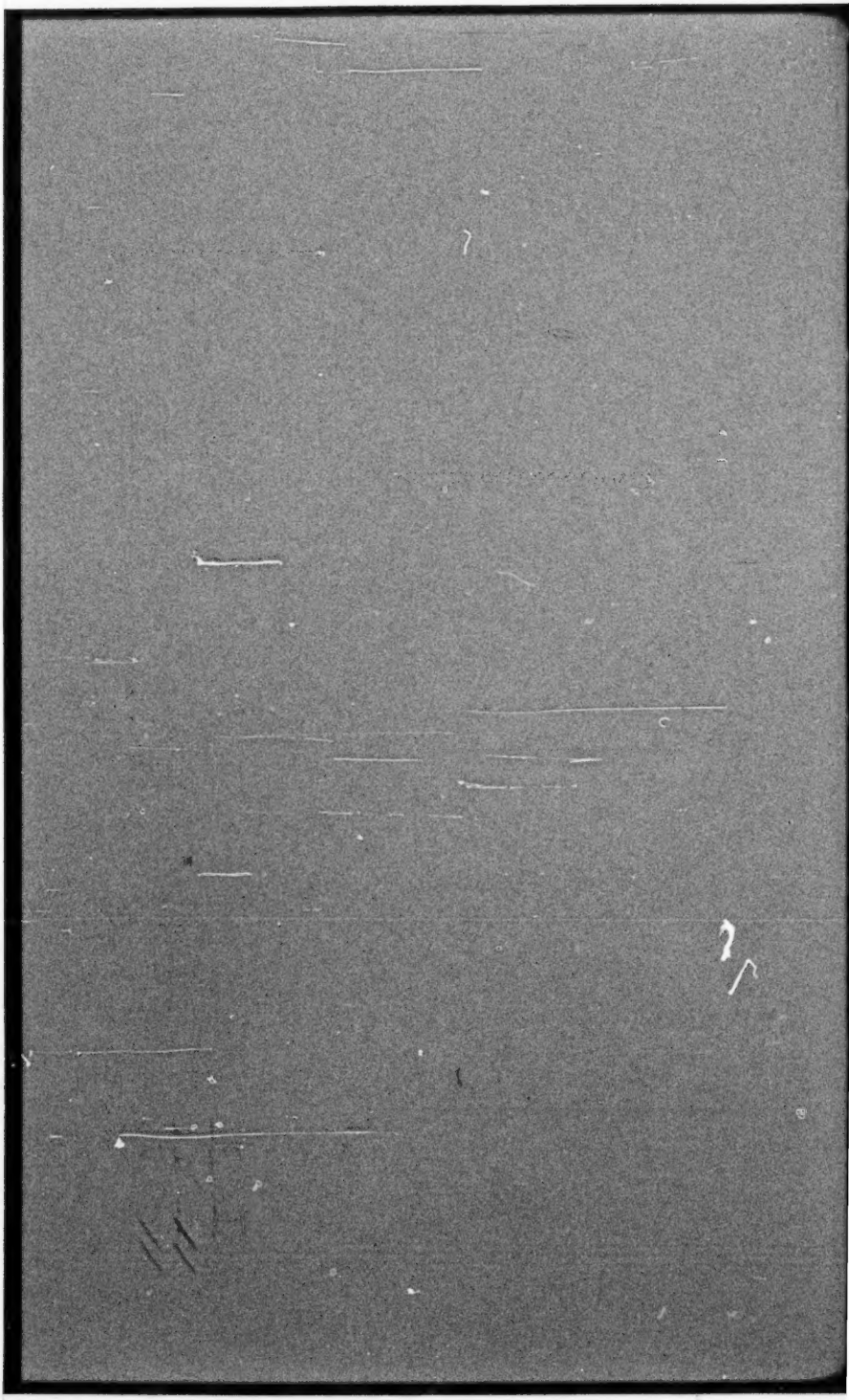

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[redacted] V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, David V. Lansden, John A. Lansden, Robert L. Lansden, Charles Sickman, Kenneth L. Martin, Joseph A. Regenstein, Jr., Paul L. Ryal, Beatrice S. Rolwing and Frank Pettit, respectfully present their petition for the issuance of a writ of certiorari directed to the

United States Court of Appeals for the Seventh Circuit and show to this Honorable Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

This is the second petition for a writ of certiorari in this case. This Court on November 8, 1948, denied certiorari, 335 U. S. 858, 93 L. Ed. 405, after the United States Court of Appeals for the Seventh Circuit, 168 F. 2d 409, had affirmed the denial by the United States District Court for the Eastern District of Illinois of petitioners' motion for a preliminary injunction.

This petition arises from the affirmance on February 13, 1950, by the Court of Appeals for the Seventh Circuit of the judgment, as modified, of the District Court sustaining defendants' motion, as amended, to dismiss the action. Within the time allowed, petitioners filed a petition for rehearing, which petition was, on April 11, 1950, denied. Thereupon the judgment of the Court of Appeals became final.

This action was brought by petitioners, who are landowners and hunting club owners, managers or operators, to enjoin respondents, who are Federal and State law enforcement officials, from enforcing the provisions of Presidential Proclamation 2748 and a Proclamation of the Governor of the State of Illinois, both dated October 1, 1947. Such proclamations permanently closed an area of approximately 20,000 acres in Alexander County, Illinois, to the hunting of all species of wild geese. The hunting lands involved in the case are all privately owned and wholly within said closed area.

Since the motion to dismiss, as amended (R. 22, 23, 36, 37), admits all facts that are well pleaded, the complaint is the sole source of the facts determining this action.

The basis of jurisdiction in the District Court was that the matter in controversy arose under the Constitution or laws of the United States or treaties made or which shall be made under their authority (R. 4). 28 U. S. C., Sec. 41 (1)—old title; 28 U. S. C., Sec. 1331—new title.

Petitioners also alleged that they are persons who have suffered legal wrong because of agency action and were adversely affected and aggrieved by such action within the meaning of Section 10 of Administrative Procedure Act, 5 U. S. C., Sec. 1009, and as such and by virtue of such cited section were entitled to judicial review of Presidential Proclamation 2748 in an action seeking injunction. Such allegations were necessary because, even with the admitted and conceded basis of jurisdiction, petitioners might have been without a remedy unless judicial review of Presidential Proclamation 2748 could be had.

The petitioners Lansdens, Regenstein and Rolwing are landowners upon whose lands hunting facilities have been developed over a period of years for the taking of migratory waterfowl, principally and almost exclusively geese. Heavy capital investments have been made in the development of such facilities. Such five petitioners operated hunting clubs as businesses, charging hunters daily hunting fees, and such businesses were flourishing and profitable (R. 6-10).

Petitioners Sickman, Martin, Ryal and Pettit were tenants on the above lands, operated the hunting clubs, and shared in the receipts from the hunting on the farms. Their shares in the hunting receipts constituted for such petitioners one of their principal sources of livelihood (R. 6-10).

The enforcement of Presidential Proclamation 2748 and the Proclamation of the Governor of Illinois will virtually destroy the value of petitioners' hunting enterprises (R. 10).

All of the lands involved in this case are wholly within the closed area (R. 5, 7, 8, 10), and such closed area surrounds a game preserve of approximately 3,544 acres of land and water wholly owned and controlled by the State of Illinois, known as Horse Shoe Lake State Game Preserve (R. 5).

There is no land owned or controlled by the United States adjacent or contiguous to the Horse Shoe Lake State Game Preserve, and in the closed area and in Alexander County, Illinois, there is no area of the United States set aside by the United States as a bird, game or other wild life reservation, breeding ground or refuge (R. 5-6).

Respondents are Federal and State prosecutors and game wardens (R. 3-4), charged with the enforcement in Alexander County, Illinois, of the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., and regulations made thereunder. Under the Game Code of Illinois, Ill. Rev. Stat., Chap. 61, Secs. 137, 139, 165, the Federal and State officials can enforce both the Federal and State laws.

The respondent game wardens are enforcing the proclamations and respondents Hart, as United States Attorney for the Eastern District of Illinois, and the State's Attorney of Alexander County, Illinois, will prosecute any violations of the proclamations brought to their attention (R. 15).

In the United States, migratory waterfowl, which include all species of wild geese, can be hunted only as permitted by regulations issued pursuant to the Migratory Bird Treaty Act, as amended, 16 U. S. C., Section 703 et seq. (R. 10). In connection with the regulations issued pursuant to said Migratory Bird Treaty Act, the Fish and Wildlife Service of the Department of the Interior collects all the data, information and facts and submits to the Secretary of the Interior a proposed regulation to govern the hunting of migratory waterfowl. After signing by

the Secretary transmits such regulations to the President for approval. Changes are made in the regulations annually. The Fish and Wildlife Service also has the duty to enforce all regulations or proclamations relating to migratory waterfowl (R. 11).

In 1947, after notice and public procedure, pursuant to Section 4 of the Administrative Procedure Act, 5 U. S. C., Section 1003, Proclamation 2739, dated July 31, 1947, was published in the Federal Register on August 2, 1947, 12 F. R. 5269, 5271-5273. Said Proclamation 2739 made it legal to take geese in Alexander County from 12 noon on November 4, 1947, up to and including December 3, 1947, in the numbers and under the conditions prescribed in Proclamation 2739, and made no special reference to Alexander County, nor were the conditions of the hunting of geese in any way different from those prescribed for the rest of the State of Illinois (R. 11). (The applicable portions of Presidential Proclamation 2739 are printed at the end of the supporting brief as Appendix "A".)

Petitioners or their attorneys or agents participated in the public procedure, hereinabove referred to, prior to June 1, 1947, and the facts concerning the hunting of geese in Alexander County were presented **or attempted to be presented** at meetings called by the Fish and Wildlife Service of the Department of the Interior in Chicago, Illinois, San Francisco, California, and St. Louis, Missouri (R. 11-12).

Petitioners admit that Proclamation 2739 is legal and valid, and by said Proclamation 2739, these petitioners could use their premises for hunting any species of wild geese in accordance with the regulations therein prescribed for the 1947 hunting season (R. 12).

On September 19, 1947, there was published in the Federal Register, 12 F. R. 6273-6274, a notice of the Department of the Interior of intention to adopt amendments to

the regulations as last amended by Proclamation 2739, which amendments would prohibit the hunting of geese in Alexander County, Illinois, in the immediate vicinity of Horse Shoe Lake. Such amendments were to take effect on November 3, 1947, and were to continue in effect thereafter until further notice. Interested persons, in accordance with such notice, were given an opportunity to participate in preparing the regulations for issuance as set forth in such notice by submitting their views, data, or arguments in writing to Albert M. Day, Director, Fish and Wildlife Service, Washington, D. C. (R. 12). (Said notice is printed at the end of the supporting brief as Appendix "B".)

On September 19, 1947, petitioner, Robert L. Lansden, called at the offices of the Fish and Wildlife Service in Chicago, Illinois, and at that time was informed by W. E. Crouch, Chief of the Game Management Division of the Fish and Wildlife Service, of the content of said notice referred to in the preceding paragraph. Said Robert L. Lansden then and there requested of Crouch that petitioners, Lansdens, and all other persons in Alexander County who might care to appear, be granted a hearing on said proposed regulation (R. 12).

On September 23, 1947, at approximately 9:45 A. M., said Crouch by long-distance telephone informed petitioners, David V. Lansden and Robert L. Lansden, that said Albert M. Day, Director, Fish and Wildlife Service, had granted the request made by Robert L. Lansden at Chicago on September 19, 1947, and that said Day would hold the hearing in Chicago at the offices of the Fish and Wildlife Service, commencing at approximately 1:30 P. M. on September 30, 1947 (R. 12).

On September 30, 1947, petitioners, David V. Lansden and Robert L. Lansden, and petitioner, Regenstein, appeared in person at said hearing, and Robert L. Lansden

appeared at said hearing as attorney for all other petitioners and as attorney for certain other persons, organizations and municipal corporations. At said hearing the views, data and arguments of the aforementioned persons were submitted partially in writing and the remainder orally, which oral statements were taken down by a shorthand reporter and later transcribed, mimeographed and mailed to some of the petitioners on October 16, 1947, and were received by such petitioners on October 20, 1947 (R. 13).

On October 3, 1947, Proclamation 2748 was published in the Federal Register, 12 F. R. 6521, 6523, and this is conceded to be final agency action within the meaning of the Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq. (R. 5). Said Proclamation 2748 was approved and signed by the President on October 1, 1947, the day after said hearing was held in Chicago. The regulation, upon which proclamation 2748 was based, was signed by the Secretary of the Interior on September 25, 1947, **which was five days before said hearing was held** in Chicago and which was two days after said W. F. Crouch informed petitioners, David V. Lansden and Robert L. Lansden, that said hearing would be held in Chicago on September 30, 1947. Only six days elapsed from the date of said notice of proposed rule making on September 19, 1947, until the date of September 25, 1947, when the Secretary of the Interior signed the proposed regulation, and only eleven days elapsed from the publication of notice to approval by the President (R. 13). (Said Proclamation 2748 is printed at the end of the supporting brief as Appendix "C".)

On October 1, 1947, the same date on which the President signed Proclamation 2748, the Governor of the State of Illinois signed a proclamation which attempted to establish a closed area identical and coterminous with the closed area described in Proclamation 2748. The legal descriptions in both of the proclamations are identical as to

words and figures. The proclamation by the Governor was filed in the office of the Secretary of State of Illinois on October 2, 1947 (R. 14). (Said Governor's Proclamation is printed at the end of the supporting brief as Appendix "D.")

None of the petitioners ever received a notice of the contemplated action by the Governor of the State of Illinois, and no hearing was ever held in connection with such proclamation (R. 16).

Paragraphs 49, 50, 51 and 52 of the complaint are quoted below since petitioners' theories of this action are therein concisely stated:

> "49. By virtue of the Federal Administrative Procedure Act, Proclamation 2748 is invalid for the following reasons:
>
> a. It is arbitrary, capricious and an abuse of discretion.
>
> b. It was made without observance of procedure required by law.
>
> c. It is in excess of statutory authority.
>
> d. No notice was ever published in the Federal Register concerning a Proclamation under the Migratory Bird Treaty Act which did not amend Proclamation 2739.
>
> e. It was made without a hearing and without an opportunity of those interested to present their views, information and data.
>
> f. It was made before and not after consideration of all relevant data and matter presented.
>
> g. It was made only six days after alleged notice was published in the Federal Register, which period of time was wholly insufficient for those persons opposed to it to present their views, data

and information, and therefore violates the intent and spirit of the Act.

"50. By virtue of the Migratory Bird Treaty Act, Proclamation 2748 is invalid for the following reasons:

a. It is arbitrary, capricious and an abuse of discretion.

b. It is discriminatory and unreasonable.

c. The standards set forth in the above Act have not been followed by the Secretary of the Interior, who has adopted additional standards not sanctioned by the above Act.

d. The standards set forth in the above Act cannot be applied to as small a geographical area as the area sought to be closed.

e. There is no authority to close an area which is not adjacent to an area of the United States set aside by the United States as a bird, game or other wildlife reservation, breeding ground or refuge.

f. It violates Regulation 4 as contained in Proclamation 2739.

"51. The proclamation by the Governor of the State of Illinois is invalid for the following reasons:

a. It violates the Constitution of the United States.

b. It violates the Constitution of the State of Illinois.

c. It is void on its face.

d. It is in conflict with Section 31 of the Game Code of Illinois.

e. It is arbitrary, discriminatory and unreasonable.

f. It is legislative action without statutory authority.

g. It was superseded by Proclamation 2748, which later Proclamation evidenced an intent on the part of the United States to assume and exercise its paramount control over the hunting of migratory waterfowl.

h. No notice was given nor was a hearing held by the Director of the Department of Conservation or by the Board of Fish and Game Conservation Advisors or by the Governer.

i. If any recommendation was made by the Director of the Department of Conservation, it was not approved by the Board of Fish and Game Conservation Advisors.

j. It is void for failure to state the length of time the area will remain closed.

k. It is part and parcel of the concerted action of the United States and the State of Illinois, and if Proclamation 2478 falls, it should fall with it.

"52. Plaintiffs allege that they have suffered and will continue to suffer immediate and irreparable injury and loss and damage unless defendants are restrained and enjoined from carrying out the enforcement of Proclamation 2478 and the proclamation by the Governer of the State of Illinois, and plaintiffs have no adequate remedy at law and bring this action to avoid a multiplicity of actions."

(For the information of this Court, in 1948 and 1949, after notice and public procedure, pursuant to Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1003, Presidential Proclamations 2801 and 2848 were published in the Federal Register, 13 F. R. 4411, 4413-4416, 14 F. R. 4798-4801. Said Proclamations 2801 and 2848 established the migratory waterfowl hunting regulations for the 1948 and 1949 seasons, respectively, and wild geese could be hunted under said Proclamations 2801 and 2848 in all of

the State of Illinois except federally owned areas and except the closed area established by Proclamation 2748, which is referred to in a footnote in both Proclamations 2801 and 2848 and which is considered, therefore, as still being in effect and not moot.)

The motion to dismiss, as amended, contains many grounds (R. 22-23, 36-37). The question of jurisdiction, the failure of the complaint to state a claim against respondents upon which relief could be granted, and the case being moot were the principal grounds relied upon by respondents. Several grounds were stated, which, in essence, were included in the failure to state a claim. Other grounds were not seriously pressed and did not enter into the decisions of the District Court (R. 37-42) and the two opinions of the Court of Appeals for the Seventh Circuit, 168 F. 2d 409, 180 F. 2d 679.

The first opinion of the Court of Appeals, 168 F. 2d 409, found Proclamation 2748 to be valid as a "proper exercise of administrative discretion vested in the Secretary of the Interior and the President" by the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704. The opinion further held the Proclamation to be neither unreasonable nor capricious, although no evidence had ever been introduced upon the basis of which any such finding could have been made. The opinion further found that the action of the Secretary of the Interior in signing Proclamation 2748 before petitioners' hearing was held in Chicago did not violate the Administrative Procedure Act. The Court of Appeals also held that petitioners had no property rights.

Thereafter the District Court, after the motion to dismiss was amended, dismissed the action because neither the jurisdictional amount nor property rights were involved, because the Administrative Procedure Act exempted from judicial review any exercise of discretion (whether abused or not) and exempted foreign affairs

functions, and because the Administrative Procedure Act did not apply to the Migratory Bird Treaty Act.

The second opinion of the Court of Appeals, 180 F. 2d 679, held that the District Court did have jurisdiction since petitioners' property rights and the jurisdictional amount were adequately alleged, and it pointed out that the District Court had misconstrued its first opinion. The Court then held that the Administrative Procedure Act did not confer an independent ground of jurisdiction. (Petitioners so concede.) The Court, again with no evidence before it, found Proclamation 2748 to be based on adequate facts and data and then stated, at page 683:

> "We hold . . . that Presidential Proclamation 2748 is valid as representing a proper exercise of the unlimited and unreviewable discretion vested and reposed by the Act" (Migratory Bird Treaty Act).

The Court then held that petitioners could never "possibly state a claim under any theory of law upon which relief could be granted." Finally the Court indicated that the questions raised by this action were of such fundamental importance as to warrant decision whether the case was moot or not.

II.

BASIS OF THIS COURT'S JURISDICTION.

The date of the judgment of the Court of Appeals for the Seventh Circuit was February 13, 1950, and the date when said judgment became final, on the denial of petitioners' petition for rehearing, was April 11, 1950. The date of this application for a writ of certiorari may be taken as the date of the filing of the petition in the office of the Clerk of this Court.

This Court has jurisdiction to review by certiorari the judgment of the Court of Appeals for the Seventh Circuit

by reason of 28 U. S. C., Sec. 1254. The jurisdiction of this Court is invoked under such sections and under Rule 38 of the Rules of the Supreme Court of the United States.

The time in which this application must be made is ninety days, 28 U. S. C. 2101 (c). Said Rule 38 sets forth what constitutes filing the petition in time.

III.

QUESTIONS PRESENTED.

The questions presented as to Presidential Proclamation 2748 are as follows:

1. Whether such proclamation is reviewable at all.

2. Whether, when agency action is committed to agency discretion, an abuse of discretion can be judicially reviewed.

3. Whether under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, a **permanently closed area** can be established.

4. Whether the standards required to be followed in the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C. 704, can be applied to an area of only 20,000 acres.

5. Whether, in view of former regulation 4 under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, which prohibits the hunting of migratory waterfowl on Migratory Bird Conservation Act refuges or "any area of the United States set aside under any other law, proclamation or Executive order for use as a bird, game or other wildlife reservation, breeding ground or refuge except so far as may be permitted by the Secretary of the Interior

under existing law, or on any area adjacent to any such refuge when such area is designated as a closed area under the Migratory Bird Treaty Act," a closed area can be established on privately owned land not adjacent to a federal refuge.

6. Whether a long continued and uniform construction of a statute by a department of government charged with its execution is entitled to great weight, and whether such construction should be continued without change and not broadened. (Regulation 4 in Proclamation 2739—Appendix "A"—Cf. Regulation 1.4 in Proclamation 2801—13 F. R. 4413.)

7. Whether any foreign affairs functions of the Federal Government are involved in the execution of the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq. and the regulations made pursuant thereto.

8. Whether the rule making provisions of Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1003, govern the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

9. If the answer to the preceding question is in the affirmative, whether the rule making provisions of Section 4 of the Administrative Act, 5 U. S. C., Sec. 1003, were complied with as regards Presidential Proclamation 2748.

10. Whether, as regards Presidential Proclamation 2748, petitioners are persons who have suffered legal wrong because of agency action or are adversely affected or aggrieved by such action within the meaning of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, and are, therefore, entitled to judicial review under said Section 10 as provided therein (Presidential Proclamation 2748 is final agency action within the meaning of said Section 10 [R. 5].)

11. Whether this action is moot and, if so, whether the importance of the questions is such as to warrant a decision.

12. Whether, irrespective of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, petitioners are entitled to judicial review of Presidential Proclamation 2748.

13. Whether, without having any evidence relating to such issue, the District Court could find and determine that Presidential Proclamation 2748 was reasonable and not arbitrary.

14. Whether, as regards Presidential Proclamation 2748, Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, was complied with.

15. Whether petitioners have been afforded due process of law under Constitution of the United States as regards Presidential Proclamation 2748.

16. Whether petitioners could possibly state a claim under any theory of law upon which relief could be granted.

The questions presented as to the Proclamation of the Governor of the State of Illinois are as follows:

1. Whether, in view of the manner in which such proclamation was adopted, petitioners have been afforded due process of law under the Constitution of the United States.

2. Whether, in view of the manner in which such proclamation was adopted, petitioners have been afforded due process of law under the Constitution of the State of Illinois.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Seventh Circuit holds that a Presidential Proclamation issued under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, is unreviewable. Such holding is in conflict with decisions of the Courts of Appeals for the Fourth and Ninth Circuits, which have reviewed them.

Bailey v. Holland, 126 F. 2d 317, 4 Cir.;
Cerritos Gun Club v. Hall, 96 F. 2d 620, 9 Cir.

2. Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, exempts from judicial review agency action which is by law committed to agency discretion. The District Court construed this section as prohibiting a review of even an abuse of discretion, and the Court of Appeals for the Seventh Circuit impliedly upheld such construction.

Cf. **Wong Yang Sung v. McGrath**, ... U. S. ..., 94 L. ed. Adv. Op. 378.

3. Without discussion, the Court of Appeals for the Seventh Circuit decided that Presidential Proclamation 2748 establishing the closed area was a proper exercise of administrative discretion vested in the Secretary of the Interior. Whether, under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, any permanently closed area can be established or whether the standards required by said act to be followed can be applied to an area of only 20,000 acres, are both important federal questions, the decision of which will determine some of the limits of the power granted to the Secretary of the Interior. Such questions have never been passed upon by this Court but should be, and the only occasion this Court has ever had to construe

the Migratory Bird Treaty Act was in the case upholding its constitutionality, **Missouri v. Holland**, 252 U. S. 416, 64 L. ed. 641, decided in 1920. This phase of the present case is unique and novel.

4. Presented to the Court of Appeals for the Seventh Circuit but not decided nor discussed by it in its opinion was the question whether, under the regulation relating to closed areas, a closed area could be established on privately owned land not adjacent to a Federal refuge. For over ten years prior to Presidential Proclamation 2748, such regulation had uniformly contained the statement, in substance, that a closed area could be established on privately owned land only if such land were adjacent to a Federal refuge. A decision as to whether Presidential Proclamation 2748 was authorized by such regulation was not specifically decided by the Court of Appeals for the Seventh Circuit but was impliedly decided by the Court's holding that Presidential Proclamation 2748 was a proper exercise of administrative discretion.

Whether the Secretary of the Interior is bound by his long continued and uniform construction of the Migratory Bird Treaty Act in so far as such construction relates to closed areas is a Federal question, the decision of which will define the limits of the power granted to the Secretary of the Interior under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

5. The Court of Appeals for the Seventh Circuit did not decide, but the District Court seemed to feel that the regulation of migratory waterfowl involved some foreign affairs functions of the United States. Whether such foreign affairs functions are legally involved is of considerable importance on the question of judicial review of Presidential Proclamation 2748. Cf. **C. & S. Air Lines v. Waterman S. S. Corp.**, 333 U. S. 103, 92 L. Ed. 568.

6. So far as petitioners have been able to ascertain, this Court has never been called upon to construe any portions of Sections 4 or 10 of the Administrative Procedure Act, 5 U. S. C., Secs. 1003 and 1009. This statute is considered by many Federal practitioners to be one of the most important Congressional enactments in recent years, and the interpretation to be given to such statute will vitally affect the relations of all citizens of the United States to their government. The Court of Appeals for the Seventh Circuit decided that none of the provisions of the Administrative Procedure Act had been violated in the adoption of Presidential Proclamation 2748, yet the undisputed facts in this case show that the Secretary of the Interior acted on September 25, 1947, before the hearing granted petitioners was held on September 30, 1947, and without consideration of petitioners' views, arguments and data on the proposed closed area.

This Court should decide all questions presented in this case that relate to the Administrative Procedure Act and settle them to prevent confusion and conflict in the lower Federal courts.

7. Another important question, which should be decided by this Court but which was not decided by the lower courts, was whether, irrespective of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, petitioners are entitled to judicial review of Presidential Proclamation 2748. Before this Court is, therefore, the question of whether Section 10 is the exclusive basis of judicial review of agency action other than that specifically provided for in specific statutes.

8. Both the District Court and the Court of Appeals for the Seventh Circuit found and decided that Presidential Proclamation 2748 was reasonable. No evidence was introduced ~~at the hearing on the motion for preliminary injunc-~~

~~tion~~ on such issue, and a finding and holding without evidence in the record to determine such vital question has been disapproved by this Court in **Kennedy v. Silas Mason Co.**, 334 U. S. 249, 92 L. Ed. 1347; **Price v. Johnston**, 334 U. S. 266, 92 L. Ed. 1356.

9. Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, has never been construed by this Court, and whether there was compliance with said section as regards Presidential Proclamation 2748 was not determined by the District Court or the Court of Appeals for the Seventh Circuit. This Court should decide whether said section really means anything or whether said section is of little importance to the administrative process.

10. The essentials of due process of law under the Constitutions of the United States and the State of Illinois are notice and an opportunity to be heard. Both the District Court and the Court of Appeals for the Seventh Circuit have impliedly held, without discussion, that petitioners were not denied due process of law as regards both proclamations involved in this case, and such implied holdings conflict with decisions of this Court and the Supreme Court of Illinois. **Morgan v. U. S.**, 298 U. S. 468, 80 L. Ed. 1288; **Coe v. Armour Fertilizer Works**, 237 U. S. 413, 59 L. Ed. 1027; **Grattan v. Ahlberg Bearing Co.**, 373 Ill. 455; **Benton v. Marr**, 364 Ill. 628.

The foregoing reasons cover all of the reasons appearing in paragraph 5 (b) of Rule 38 of this Court, any one of which could well be sufficient for this Court to grant the prayer of this petition.

PRAYER.

Your petitioners therefore respectfully pray that a writ of certiorari be issued out of this Honorable Court, commanding the United States Court of Appeals for the

Seventh Circuit to certify and send to this Court a complete transcript of the record and all proceedings in said Court of Appeals in this cause entitled "No. 9956, David V. Lansden et al., Plaintiffs-Appellants, v. William W. Hart, as United States Attorney for the Eastern District of Illinois et al., Defendants-Appellees," to the end that this cause may be reviewed by this Honorable Court, and that said judgment of the Court of Appeals be reversed and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

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Pro Se.

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ROBERT L. LANSDEN,
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Cairo, Illinois,

Counsel for Petitioners Not Appearing Pro Se.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. .....

DAVID V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court has not been officially reported, but the ~~oral~~ memorandum opinion of the District Court ~~announced at the time of the denial of the motion for preliminary injunction~~ is found at R. 37-42.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 180 F. 2d 679-684 (former opinion 168 F. 2d 409-412).

II.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition for writ of certiorari under the hearing "Basis of This Court's Jurisdiction," and is, therefore, not repeated here.

III.

STATEMENT OF THE CASE.

A statement of the case containing all that is deemed material to the consideration of the questions presented with appropriate page references to the record appears in the petition for writ of certiorari under the heading "Statement of the Matter Involved," to which reference is hereby respectfully made.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Seventh Circuit erred in each of the following respects:

1. In affirming the judgment of the District Court.

2. In holding that a Presidential Proclamation issued under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, is unreviewable.

3. In ruling that a permanently closed area can be established under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704.

4. In holding, in effect, that the standards required to be followed in the adoption of regulations under the Migratory Bird Treaty Act, 16 U. S. C., Sec. 704, can be applied to an area of only 20,000 acres.

5. In holding that a closed area can be established on privately owned land not adjacent to a federal refuge.

6. In refusing to decide whether a long continued and uniform construction of a statute by a department of government charged with its execution is binding on such agency.

7. In failing to decide whether foreign affairs functions were or were not involved in the execution of the Migratory Bird Treaty Act, 16 U. S. C., Sec. 703 et seq., and the regulations made pursuant thereto.

8. In deciding that the rule making provisions of Section 4 of the Administrative Procedure Act, 5 U. S. C., Sec. 1003, were complied with.

9. In refusing to hold that petitioners are persons who have suffered legal wrong because of agency action or are adversely affected or aggrieved by such action within the

meaning of Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009.

10. In refusing to hold that petitioners are entitled to judicial review under said Section 10 of the Administrative Procedure Act.

11. In holding that petitioners could not possibly state a claim under any theory of law upon which relief could be granted.

12. In failing to decide whether petitioners are entitled to judicial review of Presidential Proclamation 2748, irrespective of said Section 10 of the Administrative Procedure Act.

13. In deciding the "reasonableness" of Presidential Proclamation 2748 without there having been any evidence or facts on the subject presented to the District Court.

14. In ignoring whether Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, was complied with as regards Presidential Proclamation 2748.

15. In ignoring the question of whether petitioners were afforded due process of law under the Constitution of the United States as regards Presidential Proclamation 2748.

16. In not deciding whether petitioners have been afforded due process of law under the Constitution of the United States or under the Constitution of the State of Illinois in the adoption of the Proclamation of the Governor of the State of Illinois.

V.

ARGUMENT.

At the outset of this argument petitioners state that it is not their intention, in any way, to argue the merits of their case, but this argument will be confined to an argument on the reasons for granting the petition for writ of certiorari.

The two opinions of the Court of Appeals for the Seventh Circuit are silent on many of the questions presented in the petition, but those questions have been in the case from the day it was filed, and the decision of some of those questions will not only determine this case but will establish binding precedents on sections of three statutes, to-wit: the Migratory Bird Treaty Act, Administrative Procedure Act and Federal Register Act, which have never heretofore been construed by this Court.

POINT I.

The Court of Appeals for the Seventh Circuit has held that under Section 10 of the Administrative Procedure Act, 5 U. S. C., Sec. 1009, that since agency action committed by law to agency discretion is exempt from judicial review, not even an abuse of discretion can be judicially examined.

If such interpretation is correct, the Administrative Procedure Act, primarily intended to broaden judicial review, has been turned into a statute which narrows judicial review to almost a vanishing point. (See Legis. History of Administrative Procedure Act as set forth in **Wong Yang Sung v. McGrath**, ... U. S. ..., 94 L. Ed. Adv. Op. 383.) It would mean that every act by a governmental employee would be "discretionary," contrary to the statute.

POINT II.

An examination of the Code of Federal Regulations and the Federal Register has disclosed that the closed area established by Presidential Proclamation 2748 is the first such closed area in the United States which is not adjacent to a Federal refuge.

The regulation relating to closed areas in effect in 1947, and which had been substantially the same for more than ten years, limits the establishment of closed area to lands adjacent to Federal refuges. Proclamation 2739 (1947), Reg. 4, 12 F. R. 5269 et seq.; Proclamation 2616 (1944), Reg. 4, 9 F. R. 9873 et seq.; Proclamation 2345 (1939), Reg. 4, 4 F. R. 3621 et seq.; Proclamation 2245 (1937), Reg. 4, 2 F. R. 1355 et seq.

In Proclamation 2801, made in 1948 (13 F. R. 4413, Reg. 1.4), this regulation was changed by eliminating the requirement that the closed area be adjacent to a Federal refuge and now indicates that any area in the United States may be designated as a closed area under the Migratory Bird Treaty Act.

This Court has not had occasion to construe the Migratory Bird Treaty Act since **Missouri v. Holland,** 252 U. S. 416, 64 L. Ed. 641, decided in 1920, which case upheld its constitutionality. Directly presented in the present case for determination are the following important Federal questions under the Migratory Bird Treaty Act:

a. Can a closed area be established under such an Act?

b. Can a closed area be established permanently without any time limit?

c. Can the standards required to be followed by said Act be applied to an area of only 20,000 acres?

d. Can a closed area be established on privately owned land not adjacent to Federal refuge?

e. Is a long continued and uniform construction of a statute by the department of government charged with its execution virtually binding on said department? **Federal Trade Commission v. Bunte Brothers**, 312 U. S. 349, 85 L. Ed. 881.

The subsequent change in former regulation 4, now found in Proclamation 2801, regulation 1.4, is a clue to the attitude of the Department of the Interior as to the validity of Presidential Proclamation 2748. By changing such regulation, has the Secretary of the Interior admitted that former regulation 4 did not permit the closure of the area involved in this case, or does the change in former regulation 4 constitute an attempt on the part of the Secretary of the Interior to assert a power he does not have and has never previously asserted under the Migratory Bird Treaty Act? **Federal Trade Commission v. Bunte Brothers**, 312 U. S. 349, 85 L. Ed. 881.

POINT III.

If foreign affairs functions of the United States are involved in the regulation of migratory waterfowl, since the Migratory Bird Treaty Act was passed pursuant to treaties with Great Britain and the United Mexican States, this Court should determine the extent of judicial review when foreign affairs functions are involved. Cf. **C. & S. Air Lines v. Waterman S. S. Corp.**, 333 U. S. 103, 92 L. Ed. 568.

It would be news to the cold and bedraggled duck hunter waiting in a chilly blind that the President of the United States, the King of England, and the President of Mexico were partially responsible for his being there.

Under the Act, the President really has only a power to veto a regulation submitted for his approval. Petitioners submit that this would not involve any foreign affairs functions.

POINT IV.

The Administrative Procedure Act, 5 U. S. C., Sec. 1001 et seq., is considered by many Federal practitioners to be one of the most important Congressional enactments in recent years. The interpretation to be given to such statute will vitally affect the relations of all citizens of the United States to their government.

This important piece of legislation was sponsored by the American Bar Association, and the **American Bar Association Journal** has contained scores of articles on this statute. This legislation was bitterly opposed by some agencies of the Federal Government. (Nathanson: Some Comments on the Administrative Procedure Act, 41 Ill. L. R. 368 [1946].) Certain agencies maintain that their actions are not controlled by the Administrative Procedure Act.

Some consider the Administrative Procedure Act to be a mere codification of prior laws and others consider it to be a milestone in the control of the exercise of governmental power.

This Court has presented to it in this case certain vital and important questions which have arisen under the Administrative Procedure Act and which, if decided, will clarify some of the most important provisions thereof. A decision by this Court construing the Administrative Procedure Act will be equally helpful to private citizens and governmental agencies.

This Court in **Wong Yang Sung v. McGrath,** ... U. S. ..., 94 L. Ed. Adv. Op. 383, has construed Section 5 of the Administrative Procedure Act, 5 U. S. C., Sec. 1004. The instant case presents for interpretation Section 4 of said statute and the effect thereof on agency action which might not require a hearing, but would, however, require compliance with other portions of said statute.

POINT V.

No evidence was offered by petitioners or respondents on the reasonableness of Presidential Proclamation 2748 so far as the scientific, biological and economic facts were concerned. On the question of reasonableness only legal questions were presented. Both the District Court and the Court of Appeals for the Seventh Circuit found and decided that Presidential Proclamation 2748 was reasonable and did not limit such findings to legal determinations as opposed to factual determinations.

This Court has in two recent cases disapproved factual determinations by lower courts which were decisive of vital rights where the crucial facts were not developed or where there was an indefinite factual situation. **Kennedy v. Silas Mason Co.**, 334 U. S. 249, 92 L. Ed. 1347; **Price v. Johnston**, 334 U. S. 266, 92 L. Ed. 1356.

This Court's power of supervision should be exercised to correct the broadening of the issue of "reasonableness" by the lower courts in this case.

POINT VI.

This Court has never passed upon Section 8 of the Federal Register Act, 44 U. S. C., Sec. 308, which requires publication of notice in the Federal Register of proposed administrative action. Said section further provides that not less than fifteen days shall elapse from the publication of the notice until the opportunity to be heard terminates unless a shorter period is reasonable.

In this case no time was set for the termination of the opportunity to be heard. (See Appendix "B.")

It is significant to note that since petitioners filed their action in November, 1947, the Secretary of the Interior has been careful to comply with Section 8 of the Federal Register Act by stating a definite time for termination of the opportunity to be heard. See 13 F. R. 1191, March 5, 1948,

Notice of Proposed Rule Making, and 14 F. R. 3452, June 24, 1949, Proposed Rules Making.

Noncompliance with Section 8 of the Federal Register Act is a violation of the Administrative Procedure Act, and the two statutes should be construed together.

POINT VII.

Notice of the proposed Presidential Proclamation 2748 was given by publication in the Federal Register. (See Appendix "B.") The hearing granted to petitioners on September 30, 1947, was held five days subsequent to September 25, 1947, the date when the Secretary of the Interior signed the Proclamation. It is submitted that under **Morgan v. U. S.**, 298 U. S. 468, 80 L. Ed. 1288, and **Coe v. Armour Fertilizer Works**, 237 U. S. 413, 59 L. Ed. 1027, these petitioners have not been afforded due process of law under the Fifth Amendment to the Constitution of the United States. Hearings before administrative agencies are not supposed to confirm previous administrative action or to place the stamp of legality on a prejudged situation. See dissenting opinion of Justice Douglas in **Ludecke v. Watkins**, 335 U. S. 160, 187, 92 L. Ed. 1881, 1898.

Petitioners were given no notice or opportunity to be heard concerning the Proclamation of the Governor of the State of Illinois (R. 16). Under the two above cited cases of this Court, petitioners have been denied due process of law under the Fourteenth Amendment to the Constitution of the United States. By reason of decisions of the Supreme Court of Illinois, **Grattan v. Ahlberg Bearing Co.**, 373 Ill. 455; **Benton v. Marr**, 364 Ill. 628, petitioners have not been afforded due process of law under Article II, Section 2, of the Constitution of the State of Illinois.

The only portion of the opinion of the Court of Appeals for the Seventh Circuit which mentions constitutionality holds that Section 3-D of the Game Code of Illinois, Ill. Rev. Stat. 1947, Chap. 61, Sec. 137, did not violate any pro-

visions of the United States and Illinois Constitutions. The question of the constitutionality of said section was not before the Court of Appeals or the lower court; otherwise a three-judge court would have been mandatory at the time of the hearing on the motion for preliminary injunction.

This Court has often commented on the requirements of "procedural due process," and such questions are specifically before it in this case.

For the Fish and Wildlife Service to hold a hearing on September 30, 1947, without telling petitioners that the Secretary of the Interior had "prejudged" and already signed the Proclamation on September 25, 1947, was no hearing at all but a mockery.

This action commenced as a dispute involving a portion of one county in the State of Illinois. Now, by reason of the decisions of the Court of Appeals for the Seventh Circuit, this action has become of vital and lasting importance to more than 2,000,000 migratory waterfowl hunters and purchasers of "duck stamps" and to thousands of farmers and operators of hunting facilities.

The second opinion of the Court of Appeals forever silences them and permits migratory waterfowl regulations to be issued that can never be questioned, examined, or upset by any court in the land. Such regulations may thus be issued with impertinence like that of a quacking duck far out of the range of the hunter's gun.

The hunting of ducks, geese, doves, etc., is a sport and recreational pursuit of persons in every State. Each year millions of dollars are spent by sportsmen in such activities. In addition, facilities of great value and extent have been developed. Yet, if the opinions of the Court of Appeals stand unchanged, no person can ever exercise a compelling voice in the management of waterfowl, for the propagation of which every hunter is taxed through his duck stamp or the tax on firearms and ammunition.

Should this large segment of citizens be prevented from judicially testing regulations which directly affect their businesses and pleasures?

And if such opinions stand, no person can challenge the validity of migratory waterfowl regulations, even in federal or state criminal proceedings in which he is a defendant.

It is submitted that the trend of statutes and decisions in this country has been for enlarged judicial review. The Court of Appeals for the Seventh Circuit is, in this action, reversing such trend.

It is further submitted that such Court has not even followed its own holding that Proclamation 2748 is unreviewable, for, by finding it valid, the Court thereby reviewed it.

CONCLUSION.

The judgments of the Court of Appeals for the Seventh Circuit and the District Court involve several important and new questions never before decided by this Court and further involve the application of principles heretofore established by this Court. Such determinations and questions merit the consideration of this Court.

Respectfully submitted,

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APPENDIX "A."

Federal Register Volume 12 No. 151, August 2, 1947,
Pages 5269, 5271-3

PROCLAMATION 2739

Amendments of Regulations Relating to
Migratory Birds and Game Mammals
By the President of the United States of America

A Proclamation

Whereas the Acting Secretary of the Interior has adopted, after notice and public procedure pursuant to section 4 of the Administrative Procedure Act of June 11, 1946 (Pub. Law No. 404—79th Cong.), and has submitted to me for approval the following amendments of the regulations approved by Proclamation No. 2616 of July 27, 1944, as amended, relating to migratory birds and game mammals included in the terms of the Convention between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, and the Convention between the United States and the United Mexican States for the protection of migratory birds and certain game mammals concluded February 7, 1936:

**Amendments of Migratory Bird Treaty Act
Regulations Adopted by the Secretary
of the Interior**

By virtue of and pursuant to the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755), and Reorganization Plan II (53 Stat. 1431), and in accordance with the provisions of the Administrative Procedure Act of June 11, 1946 (Pub. Law No. 404—79th Cong.), I, Oscar L. Chapman, Acting Secretary of the Interior, having due regard to the zones of temperature and to the distribution, abundance, eco-

nomic value, breeding habits, and times and lines of migratory flight of migratory birds included in the terms of the Convention between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916, and the Convention between the United States and the United Mexican States for the protection of migratory birds and game mammals, concluded February 7, 1936, have determined when, to what extent, and by what means it is compatible with the terms of the said Act and conventions to allow the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, exportation and importation of such birds and parts thereof and their nests and eggs, and in accordance with such determinations, do hereby amend as follows the regulations approved by Proclamation No. 2616 of July 27, 1944, as last amended by Proclamation No. 2699 of August 8, 1946, and as so amended do hereby adopt such regulations as suitable regulations, permitting and governing the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, exportation, and importation of such migratory birds and parts, nests, and eggs thereof:

* * * * * * *

Regulation 4, "Open Seasons on and Possession of Certain Migratory Game Birds," is amended to read as follows:

* * * * * * *

Nothing herein shall be deemed to permit the taking of migratory birds on any reservation or sanctuary established under the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), or on any area of the United States set aside under any other law, proclamation, or Executive order for use as a bird, game or other wildlife reservation, breeding ground, or refuge except so far as may be permitted by the Secretary of the Interior under existing law, or on any area adjacent to any such refuge

when such area is designated as a closed area under the Migratory Bird Treaty Act.

Waterfowl and Coot. The open season on waterfowl and coot (except wood ducks in Arizona, Colorado, Kansas, Massachusetts, Nebraska, Nevada, New Jersey, North Dakota, Utah, West Virginia and Wyoming; snow geese in Beaverhead, Gallatin, and Madison Counties in Montana, in Colorado, Idaho and Wyoming, and snow geese and brant in States bordering on the Atlantic Ocean; Ross' geese, and swans) in the several States, Alaska and Puerto Rico shall be as follows, both dates inclusive:

* * * * * * *

Illinois, Missouri and West Virginia, November 4 to December 3.

* * * * * * *

Regulation 5, "Daily Bag and Possession Limits on Certain Migratory Game Birds," is amended to read as follows:

A person may take in any one day during the open seasons prescribed therefor in regulation 4 not to exceed the following numbers of migratory game birds, which numbers shall include all birds taken by any other person who for hire accompanies or assists him in taking such birds. When so taken, such birds may be possessed in the number hereinafter specified, except that no person on the opening day of the season may possess any migratory game birds in excess of the daily limits herein prescribed.

* * * * * * *

Geese and brant (except snow geese in Beaverhead, Gallatin and Madison Counties in Montana, in Colorado, Idaho, and Wyoming, and snow geese and brant in States bordering on the Atlantic Ocean; and Ross' geese anywhere), as follows:

In Washington, Oregon and California 5, including in such limits any combination not exceeding 2 of Canada geese (including Hutchins or cackling geese), white-fronted geese and brant.

In Alaska, Puerto Rico, Idaho, Utah, Arizona and Nevada 4, including in such limit not more than 2 Canada geese (including Hutchins or cackling geese), or 2 white-fronted geese or 1 of each.

Elsewhere than in the above States 4, including in such limit either 1 Canada goose (including Hutchins or cackling geese) or 1 white-fronted goose.

Any person may possess not more than the above bag limits of geese or brant.

In view of the fact that the hunting season on a number of migratory birds normally opens on September 1, it has been determined that these amendments shall become effective August 31, 1947.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be fixed, this 29th day of July, 1947.

Oscar L. Chapman,
(Seal) Acting Secretary of the Interior.

And Whereas upon consideration it appears that approval of the foregoing amendments will effectuate the purposes of the aforesaid Migratory Bird Treaty Act:

Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by section 3 of the said Migratory Bird Treaty Act of July 3, 1918, do hereby approve and proclaim the foregoing amendments.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of
(Seal) July in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

Harry S. Truman.

By the President:

G. C. Marshall,
Secretary of State.

(F. R. Doc. 47-7309; Filed, July 31, 1947; 4:26 p. m.)

APPENDIX "B."

Federal Register Volume 12 No. 184, September 19, 1947, Pages 6273-4

Proposed Rule Making

Department of the Interior
Office of the Secretary

(50 CFR, Part 1)

Protection of Migratory Birds and Certain Game Mammals

Notice of Intention to Adopt Amendments

Pursuant to section 4 (a) of the Administrative Procedure Act approved June 11, 1946 (Public Law 404, 79th Cong.), and the authority contained in section 3 of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), as amended, notice is hereby given that the Secretary of the Interior intends to take the following action:

Adopt an amendment to the regulations for the protection of migratory birds and certain game mammals as last amended and approved by Proclamation No. 2739, July 1, 1947 (12 F. R. 5269), which will prohibit the hunting, taking, capture, killing and possession of geese in Alexander County, Illinois, in the immediate vicinity of Horseshoe Lake.

The foregoing regulations are to be effective beginning November 3, 1947, and to continue in effect thereafter until further notice.

Interested persons are hereby given an opportunity to participate in preparing the regulations for issuance as set

forth by submitting their views, data, or arguments in writing to Albert M. Day, Director, Fish and Wildlife Service, Washington, D. C.

Oscar L. Chapman,
Under Secretary of the Interior.

September 16, 1947.

(F. R. Doc. 47-8529; Filed Sept. 18, 1947; 8:47 a. m.)

APPENDIX "C."

Federal Register Volume 12 No. 194, October 3, 1947,
Pages 6521, 6523

PROCLAMATION 2748
Closed Area Under the Migratory Bird
Treaty Act, Illinois
By the President of the United States of America

A Proclamation

Whereas the Secretary of the Interior has submitted to me for approval the following regulation adopted by him after notice and public procedure pursuant to section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), under authority of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), and Reorganization Plan No. II (53 Stat. 1431):

Regulation Designating as Closed Area Certain Lands and Waters in Alexander County, Illinois

By virtue of and pursuant to the authority contained in section 3 of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755, 16 U. S. C. 704), Reorganization Plan No. II (53 Stat. 1431), and in accordance with the provisions of section 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), I, J. A. Krug, Secretary of the Interior, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of flight of the migratory birds herein referred to and included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916, and between the United States and the United Mexican States for the protection of migratory birds and game mammals, concluded February 7, 1936, and in consideration of the obligation imposed by said treaties of insuring the preser-

vation of said migratory birds, do hereby designate as closed area, effective November 3, 1947, in or on which pursuing, hunting, taking, capturing, or killing of all species of wild geese, or attempting to take, capture, or kill such wild geese is not permitted, all that area of land and water situate in Alexander County, Illinois, within the following described exterior boundary:

(Description omitted.)

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed this 25th day of September, 1947.

J. A. Krug,
(Seal) Secretary of the Interior.

And Whereas upon consideration it appears that the foregoing regulation will tend to effectuate the purposes of the aforesaid Migratory Bird Treaty Act of July 3, 1918:

Now, Therefore, I, Harry S. Truman, President of the United States of America, under and by virtue of the authority vested in me by the aforesaid Migratory Bird Treaty Act of July 3, 1918, do hereby approve and proclaim the foregoing regulation of the Secretary of the Interior.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 1st day of
(Seal) October in the year of our Lord nineteen hundred and forty-seven, and of the Independence of the United States of America the one hundred and seventy-second.

Harry S. Truman.

By the President:

Robert A. Lovett,
Acting Secretary of State.

(F. R. Doc. 47-9006; Filed Oct. 2, 1947; 12:12 p. m.)

APPENDIX "D."

State of Illinois.

Executive Department.

PROCLAMATION.

Whereas, the conservation of all our natural resources, and the protection and restoration of those which are renewable become increasingly important to the citizens of Illinois with each passing year, and

Whereas, the wild geese of Illinois are in danger of extermination, and

Whereas, the wild geese are highly valuable for their contribution to the beauties of nature and the enjoyment of outdoor life, and

Whereas, the destruction of wild geese occurs mainly in the vicinity of Horseshoe Lake in Alexander County, Illinois, and

Whereas, the continuation of the annual migration of this bird through Illinois is dependent upon the protection of wild geese in part of Alexander County, and

Whereas, the State of Illinois is obligated by law to insure the safety and preservation of migratory waterfowl, now, therefore, I, Dwight H. Green, Governor of the State of Illinois, do hereby designate as a *closed area,* in or on which pursuing, hunting, taking, capturing or killing of all species of wild geese, or attempting to take, capture or kill said wild geese is not permitted, all that area of land and water situated in Alexander County, Illinois, within the following described exterior boundary:

(Description omitted.)

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of Illinois to be affixed.

Done at the Capitol in the City of Springfield, this first day of October, in the Year of Our Lord one thousand nine hundred and forty-seven, and of the State of Illinois the one hundred and twenty-ninth.

(Seal of the State of Illinois)

Dwight H. Green,
Governor.

By the Governor.

"Filed
Executive Department
Oct 2—1947
Edward J. Barrett
Secretary of State"

Edward J. Barrett
Secretary of State

Office-Supreme Court, U. S.
FILED
AUG 31 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.

No. 189

DAVID V. LANSDEN ET AL., *Petitioners,*

v.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 189

DAVID V. LANSDEN ET AL., *Petitioners,*

v.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF.

I.

The principal question involved in this case is inaccurately stated in the brief of the Federal Respondents and tends to divert the Court's attention from the important issues involved.

The question is whether Presidential Proclamations issued pursuant to the Migratory Bird Treaty Act, 16 U. S. C.

704, governing the hunting, etc. of migratory water fowl are subject to judicial review.

The opinion of the U. S. Court of Appeals for the Seventh Circuit holds in the negative. Yet two other U. S. Courts of Appeals have held in the affirmative. *Cerritos Gun Club* v. *Hall*, 96 F. 2d 620 (9 Cir.); *Bailey* v. *Holland*, 126 F. 2d 317 (4 Cir.).

True it is that both those cases were decided prior to the passage of the Administrative Procedure Act, 5 U. S. C. 1001 et seq. However, the primary purpose of such statute was either to broaden judicial review or to codify the existing law on the subject of judicial review. No legislator, proponent, opponent, or court has indicated that the Administrative Procedure Act would narrow existing rights to judicial review. Yet the U. S. Court of Appeals for the Seventh Circuit has interpreted the Act in such manner that the trend culminating in the passage of the Administrative Procedure Act has been reversed and headed in a direction toward administrative immunity from judicial scrutiny.

The Court has never construed the sections of the Administrative Procedure Act involved in this case.

II.

The case law of this country exists for the purpose of announcing binding precedents. Twice the U. S. Court of Appeals for the Seventh Circuit has written opinions in this case. *Lansden* v. *Hart*, 168 F. 2d 409, cert. denied 335 U. S. 858; and *Lansden* v. *Hart* 180 F. 2d 679.

Yet the two opinions are in conflict with each other. The first reviewed the proclamation and (without any evidence in the record upon which to base such findings) found Presidential Proclamation 2748, 12 F. R. 6521 to be reasonable and not arbitrary. The second held that Presidential Proclamation 2748 was unreviewable.

This Court should determine whether either opinion of the U. S. Court of Appeals for the Seventh Circuit is cor-

rect. Until this Court does so determine, practitioners will be confused and uncertain, and additional protracted litigation will undoubtedly result until such time as this Court finally decides the questions herein involved.

III.

The Federal Respondents have been maintaining ever since 1948 that the questions involved in this appeal are moot.

The basis of such contention is that Presidential Proclamation 2748, 12 F. R. 6521 et seq., issued in 1947, has been reenacted annually in 1948 and in 1949 by Presidential Proclamation 2801, 13 F. R. 4411 et seq., and Presidential Proclamation 2848, 14 F. R. 4798 et seq., respectively. An examination of the latter two proclamations will show that Presidential Proclamation 2748 has never been changed or modified and that it is still in effect on the basis of the purported findings of the Fish and Wildlife Service of the Department of Interior for the period prior to June 19, 1947 (R. 13).

Whatever advantage the Federal Respondents hope to gain by their argument that the case is now moot was categorically denied them by Judge Duffy, who wrote the opinion in this case below, when he said at 180 F. 2d 679, at page 684 (R. 66):

> "We have not discussed the question raised that the issues now before us are moot inasmuch as Proclamation 2748 referred only to the 1947 hunting season, and Proclamations 2801 and 2848 applied to the 1948 and 1949 hunting seasons respectively, and that these seasons are now passed. We are of the opinion that certain important fundamental questions were raised by this suit which should be settled at this time, rather than having other actions commenced during subsequent hunting seasons after the publication of regulations pertaining to hunting during such seasons, in order to decide such questions."

The same considerations which impelled the Court below to decide the case are equally valid before this Court.

Respectfully submitted,

DAVID V. LANSDEN,
Pro Se.

ROBERT L. LANSDEN,
Pro Se.

JOHN F. DONELAN,

ROBERT L. LANSDEN,

Counsel for Petitioners Not Appearing Pro Se.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 189

DAVID V. LANSDEN, ET AL., PETITIONERS

v.

WILLIAM W. HART, AS UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS HART, MARTIN, AND SJOSTROM IN OPPOSITION

OPINIONS BELOW

The memorandum of the district court (R. 37-42) is not reported. The opinion of the court of appeals (R. 59-66) is reported in 180 F. 2d 679, and its opinion upon a previous appeal in this case is reported in 168 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1950 (R. 67). A petition

for rehearing was denied on April 11, 1950 (R. 68). The petition for a writ of certiorari was filed on July 10, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

QUESTION PRESENTED

Whether, in view of the discretion vested in the President and the Secretary of the Interior to issue regulations governing the hunting of migratory birds, the complaint states any basis for enjoining the enforcement of a regulation establishing a closed area.

STATUTE INVOLVED

The Migratory Bird Treaty Act of July 3, 1918, secs. 2 and 3, 40 Stat. 755, as amended by the Act of June 20, 1936, Secs. 2 and 3, 49 Stat. 1556, and by Reorganization Plan No. II, Sec. 4(f), 53 Stat. 1433, 16 U.S.C. secs. 703 and 704, provides:

> Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included

in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the conventions, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

STATEMENT

This suit was instituted in November 1947, to enjoin various officials of the Federal and State governments from enforcing certain regulations relating to migratory birds. The various plaintiffs, it is alleged, own or lease farms in the vicinity of Horse Shoe Lake, Alexander County, Illinois, where the State has established a game preserve.

On October 1, 1947, the President pursuant to the Migratory Bird Treaty Act of July 3, 1918, as amended, 16 U.S.C. 703-711, signed Proclamation 2748, 12 F.R. 6521, which prohibited hunting of all species of wild geese in a designated area surrounding the Horse Shoe Lake Preserve. The regulations under the Migratory Bird Treaty Act, which are re-issued annually, have included a similar prohibition for the 1948 season (Proclamation 2801, 13 F.R. 4411) and the 1949 season (Proclamation 2848, 14 F.R. 4798). A similar proclamation was signed at the same time by the Governor of Illinois.

Alleging that enforcement of these proclamations would cause losses to the plaintiffs in the conduct of hunting business on farms owned or leased by them, plaintiffs sought an injunction against enforcement of the proclamations asserting illegality in various particulars. A preliminary injunction was denied and this order was affirmed upon appeal. *Lansden* v. *Hart,* 168 F. 2d 409 (C.A. 7). Pointing out that the Act prohibits all hunting of migratory birds except as may be permitted by regulation, the court held that Proclamation 2748 was a proper exercise of the administrative discretion vested in the Secretary of the Interior and the President. It rejected plaintiffs' claims that as a matter of law no permanently closed area could be established, that an area as small as 20,000 acres could not be

closed while hunting is permitted in the rest of the State, and that a closed area could not be established on privately-owned land adjacent to a State refuge rather than a Federal refuge.

A petition for writ of certiorari to review this decision having been denied, *Lansden* v. *Hart,* 335 U.S. 858, the trial court granted defendants' motions to dismiss the complaint on the ground that it had no jurisdiction and, alternatively, that the complaint failed to show adequate grounds for an injunction (R. 37-42). The court of appeals held that, except as to one plaintiff, jurisdiction was sufficiently asserted in the allegations that the value of the right to hunt which would be lost by enforcement of the regulation exceeded $3,000 in each instance (R. 62-63). It rejected, however, the further claim that section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 243, 5 U.S.C. 1009, gave plaintiffs a right to judicial review holding that the exception from section 10 where "agency action is by law committed to agency discretion" applied (R. 63-65). The court below affirmed the judgment of dismissal on the ground that plaintiffs could not possibly state a claim under any theory of law upon which relief could be granted, since the agency action, if reviewable at all, could be overturned only if it was so arbitrary and capricious as to constitute an abuse of discretion, and that the facts set out in the complaint themselves negative any abuse of discretion.

ARGUMENT

1. Petitioners assert that some sixteen questions are presented which they group into seven points in their argument (Pet. 25-32). Analysis will show, however, that petitioners fail to indicate any error in the decision below. Petitioners' claim (Point II, Pet. 26-27), that the Proclamation was invalid because a permanently closed area could not be established under the Migratory Bird Treaty Act, that the area here was too small and was adjacent to a State wild life refuge, plainly lacks merit, as was held upon the first appeal in this case, because of the broad discretion vested in the administrative officers to determine "when, to what extent, if at all" hunting should be permitted. The only remaining claim, characterizing the Proclamation as "arbitrary, capricious, and an abuse of discretion," "discriminatory" and "unreasonable" (paragraphs 49, 50 of the complaint, R. 15) presents no basis for the granting of relief to petitioners. As the court below pointed out (R. 65), the complaint "shows extraordinary effort by the agency to arrive at a fair and reasoned conclusion." Many conferences and hearings were held, interested persons were given an opportunity to submit their views, data and arguments, and these were presented on behalf of all the petitioners (paragraphs 35, 37-41, R. 11-13). It is thus apparent that petitioners seek simply a judicial review of the wisdom of the administra-

tive action. But clearly the Migratory Bird Treaty Act vested discretion in the Secretary of the Interior and the President to determine what regulations were desirable. The facts which petitioners desire to submit to the courts—the "scientific, biological and economic facts" (Pet. 29)—would relate, at most, to the question whether the proclamation was unwise and hence could not be the basis of a conclusion that the proclamation was illegal. It follows that dismissal of the complaint was clearly correct.

We believe that the court below was plainly right in holding that the Administrative Procedure Act did not constitute an additional and independent ground of federal jurisdiction. In any event, since the court found that jurisdiction did exist except as to plaintiffs Stenzels, petitioners' argument concerning the Act (Points I, III, IV, Pet. 25, 27, 28) presents no ground for review of the present decision. Certainly the Administrative Procedure Act did not vest in the courts a general supervisory authority over the exercise of the discretion vested in the Secretary of the Interior and the President by the Migratory Bird Treaty Act, nor did it give to petitioners the right which they seek to "exercise a compelling voice in the management of waterfowl." (Pet. 31).[1]

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[1] Petitioners' objection to the procedure by which the Proclamation was first adopted (Points VI, VII, Pet. 29-31) were correctly rejected upon the first appeal and, since the

CONCLUSION

The decision of the court below is correct and presents no conflict or question which should be decided by this Court.

Respectfully submitted,

ARNOLD RAUM,
Acting Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

AUGUST 1950.

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regulations have been re-issued annually after compliance with the acts relied upon by petitioner (Pet. 29-30), any question as to procedural defects in the original proceedings is plainly moot.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 189.

DAVID V. LANSDEN et al., Petitioners,

vs.

WILLIAM W. HART, as United States Attorney for the Eastern District of Illinois, et al., Respondents.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully petition the Court to vacate the order entered on October 9, 1950, denying the petition for writ of certiorari, and move to grant said petition for said writ of certiorari as prayed therein.

Intervening circumstances of substantial or controlling effect and other substantial grounds available to petitioners although not previously presented are as follows:

I.

The significance of this case has been brought into sharper focus since petitioners filed their petition for writ of certiorari.

The establishment in 1947 of the area closed to the hunting of geese in Alexander County, Illinois, by Proclamation 2748, 12 F. R. 6521, was ostensibly done to hold down what the Fish and Wildlife Service in the Department of the Interior felt might have been an excessive annual kill of geese in such county.

In the years 1944 and 1945, the annual hunting regulations made no distinction between Alexander County and the rest of the State of Illinois, but by order of the Secretary of the Interior, acting on the advice of the Fish and Wildlife Service, the season in 1944 on geese in Alexander County was closed on November 17, 1944, after about twenty days of hunting, the kill then amounting to something in excess of 6,000 geese. 9 F. R. 13669.

In 1945 the season was similarly closed in Alexander County on November 28, 1945, after a few days hunting wherein less than 5,000 geese were killed. 10 F. R. 14527.

The method used to stop hunting in Alexander County in the years 1944 and 1945 has not been used since.

In 1946 the entire Mississippi Flyway was closed to the hunting of geese by Proclamation 2699, 11 F. R. 8707. Surprisingly enough, such closure of the Mississippi Flyway was not the result of the 1945 kill in Alexander County, but was made because of excessive kills in Wisconsin and Michigan. (Press Release, Fish and Wildlife Service, August, 1946.)

However, in 1949 over 30,000 geese were killed outside the closed area from the flock that winters in Alexander County. Instead of considering such kill to be excessive, responsible officials of the Fish and Wildlife Service at its public meetings held in 1950 expressly commented upon the wonderful kill of geese from such flock. (Proceedings, public waterfowl meetings, Hotel Peabody, Memphis, Tennessee, April, 1950, and Hotel Jefferson, St. Louis, Missouri, May, 1950.)

The ostensible reasons for the establishment of the closed area having been publicly repudiated, the closed area must have been based on something other than a concern over the possibility of an excessive kill of geese from the Horse Shoe Lake flock.

Since the filing of petitioners' application for writ of certiorari, the true reasons for the establishment of the closed area have been disclosed by Federal and State officials.

The closed area herein is still the only closed area where no Federal land ownership is involved. Herein private lands around a State preserve were closed. There is no Federal refuge in Alexander County (R. 5).

The closure in Alexander County is the first of a contemplated series of closures over all the United States that will include private lands and public shooting areas owned and operated by State Game Departments. (Proceedings, annual conference International Association of Game, Fish and Conservation Commissioners, Memphis, Tennessee, September 15, 1950, statement of Dr. Clarence E. Cottam, Assistant Director of the Fish and Wildlife Service.)

If the two opinions of the Court of Appeals for the Seventh Circuit in this case, 168 F. 2d 409 and 180 F. 2d 679, both stand unchanged, this case has become the legal

precedent for establishing closed areas in any state in the United States wherever and whenever the Fish and Wildlife Service, justifiably or unjustifiably, feels that hunters are too successful in their hunting of waterfowl.

Another reason for the closure in Alexander County is really vicious. The Horse Shoe Lake State Game preserve has been since 1942 and is to be enlarged by purchase or condemnation by the State of Illinois over a period of years. Seventy-five per cent of funds for such enlargement is furnished by the Federal Government from the Federal Aid to Wildlife Restoration fund (Pittman-Robertson Act), 16 U. S. C., Secs. 669-669j. Officials of the Fish and Wildlife Service and the Conservation Department of the State of Illinois working together now state in substance to petitioners as follows: "We closed you down. We're going to keep you closed down. That will destroy permanently the value of your right to use your land for hunting. Then we won't have to pay you anything for the value of your hunting rights although your land's greatest value is its hunting potential."

A totalitarian technique is thus being used openly in these United States to compel petitioners to give up their lands at the government's depreciated figure.

II.

Altough the Court of Appeals found in its second opinion, 180 F. 2d 679, that petitioners had property rights sufficient to seek injunctive relief in the Federal Court, it forever denied to petitioners any protection for such rights.

The Court of Appeals at 180 F. 2d 679 at 684 states:

> "As the act itself is constitutional and as the regulations for the 1947 season issued thereunder (Proclamation 2748) are in all respects legal and valid, it

follows that the plaintiffs **cannot possibly state a claim under any theory of law upon which relief can be granted.**" (Emphasis supplied.)

An analysis of the opinion shows that the Court of Appeals assumed the result it reached without having any evidentiary facts before it.

What remedy, if any, is left to petitioners?

III.

The availability and extent of judicial review of administrative action are live issues of law today both in Federal and State Courts.

Pending before this Court are, among others, three cases in which certiorari has been granted. **National Council of American-Soviet Friendship et al. v. McGrath**, October Term, 1950, No. 7 (opinion of Court of Appeals for the District of Columbia not reported); **Joint Anti-Fascist Refugee Committee v. McGrath**, October Term, 1950, No. 8 (opinion below, 177 F. 2d 79), and **International Workers Order, Inc., et al., v. McGrath**, October Term, 1950, No. 71 (opinion below, 182 F. 2d 368).

The cited cases involve in part the question of judicial review of the determination by the Attorney General that an organization is subversive, pursuant to powers granted him by Executive Orders.

In this case there are no allegedly Communist or Communist Front organizations involved. Petitioners are just plain American citizens who seek judicial review of a Presidential Proclamation which closed their lands to the hunting of wild geese.

If judicial review in the three cited cases is upheld, and is denied in this case, as it was by the Court of Appeals for the Seventh Circuit, the anomalous situation is pre-

sented that an organization labelled subversive, taking its orders from Moscow, can use our judicial process to gain a hearing on the merits of its case while American citizens are denied the same right.

Petitioners rightfully feel that the supervisory powers of the judiciary should be as much available to them as to allegedly subversive organizations.

For this reason, this petition for rehearing is filed to prevent extinction by lapse of time of petitioners' rights in the event any of the three cited cases hold in favor of judicial review or establish a precedent applicable to this case.

CONCLUSION.

Wherefore, for the reasons herein stated and for all of the reasons set forth in the petition for writ of certiorari and brief in support thereof, petitioners pray the Court to grant a rehearing hereon, to vacate the order entered on October 9, 1950, and to grant the petition for writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners Not Appearing Pro Se.

Certificate of Counsel.

We, David V. Lansden, one of the petitioners, Robert L. Lansden, one of the petitioners and counsel for other petitioners, and John F. Donelan, counsel for other petitioners, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

We also certify that said petition is restricted to the grounds specified in Rule 33, as amended, of the Rules of this Court.

David V. Lansden,

Robert L. Lansden,

John F. Donelan.